

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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JUN 14 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of:

Implementation of
Commission's Equal
Employment Opportunity Rules

MM Docket No. 94-34

TO THE COMMISSION

PETITION TO FILE COMMENTS OUT OF TIME

The League of United Latin American Citizens, the Minority Media and Telecommunications Council, the National Association for the Advancement of Colored People, the National Bar Association, and Office of Communication of the United Church of Christ, (collectively "Commenters") respectfully seek leave to file Comments on the above captioned matter one (1) day late. It was due June 13, 1994 however, due to difficulties with computer software it was impossible to file on time.

Commenters believe that it is important that its Comments be accepted because of the unique public interest viewpoint that they present. Furthermore, the acceptance of these Comments should not cause any noticeable delay in this proceeding before the Commission.

Respectfully Submitted
on behalf of Commenters

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June 14, 1994

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**COMMENTS OF THE LEAGUE OF LATIN AMERICAN CITIZENS,
THE MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL,
THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,
THE NATIONAL BAR ASSOCIATION AND THE OFFICE OF COMMUNICATION OF
THE UNITED CHURCH OF CHRIST**

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TABLE OF CONTENTS

SUMMARY	i
I. INTRODUCTION	1
II. THE STATUS OF MINORITY EMPLOYMENT IN THE MEDIA AND TELECOMMUNICATIONS INDUSTRIES.	1
A. EMPLOYMENT TRENDS - BROADCAST	3
B. EMPLOYMENT TRENDS - CABLE TV.	3
C. EMPLOYMENT TRENDS - COMMON CARRIERS	4
D. FINANCIAL FORFEITURES RESULT IN SUBSTANTIAL IMPROVEMENTS IN EMPLOYMENT PRACTICES.	6
III. ANALYSIS AND RECOMMENDATIONS - BROADCAST	7
A. BROADCAST EEO RULES AND POLICIES	
1. THE COMMISSION SHOULD INCREASE ITS PROCESSING GUIDELINES FOR THE "ZONE OF REASONABLENESS" TO 100% PARITY	8
a. The Number of Minority and Women in Broadcasting Must be Increased in Order to Achieve the Goals of Diversity and Increased Employment Opportunities	8
b. The Current "50/50" Guideline was not Intended to be a Stopping Point for Broadcast EEO Efforts.	9
2. THE COMMISSION SHOULD EXTEND ITS EEO JURISDICTION TO THE NETWORKS.	11
3. THE COMMISSION SHOULD CLARIFY ITS POSITION ON DEFENSES TO BROADCAST EEO COMPLAINTS	12
a. Race-neutral factors (market size, station size, format and pay) should be identified and excluded as defenses for noncompliance. It is no harder -- indeed it is often easier -- to "find qualified minorities" in small as in large markets.	12

b.	The way a licensee may "decrease ...burdens" of EEO compliance is to stop discriminating. The burdens are extremely slight, and barely result in the provision of sufficient information to allow the Commission and the public to monitor compliance	15
4.	PARTTIME HIRES SHOULD BE CONSIDERED IN EVALUATING EEO PERFORMANCE, AS SHOULD THE FAILURE TO HIRE EVEN PARTTIME EMPLOYEES. A PARTTIME EMPLOYEE SHOULD BE DEFINED AS A FICA EMPLOYEE (RATHER THAN AN INDEPENDENT CONTRACTOR) WORKING AT LEAST TEN HOURS PER WEEK	16
5.	THE SECOND GENERATION OF EEO COMPLIANCE EFFORTS SHOULD INCLUDE MEASURES TO INSURE EQUAL OPPORTUNITY FOR THOSE WHO HAVE GOTTEN IN THE DOOR THROUGH THE FIRST GENERATION OF EEO COMPLIANCE EFFORTS.	17
a.	Promotion, retention, training, working conditions, compensation and termination are the earmarks of post-hiring affirmative action compliance	17
b.	The Commission Should Develop a Model Recordkeeping System that Will Improve Compliance with the 5-Step EEO Program Requirements	22
6.	THE USE OF MINORITY CONTRACTORS SHOULD BE COVERED BY THE BROADCAST EEO RULE AND ENFORCED VIGOROUSLY.	22
7.	PRIVATE ATTORNEYS GENERAL SHOULD BE ABLE TO BE COMPENSATED FROM A PUBLIC INTEREST FUND WHEN THEY TRY EEO CASES IN HEARING	23
8.	THE COMMISSION SHOULD NEGOTIATE MEMORANDA OF UNDERSTANDING WITH SECTION 706 AGENCIES	29
B.	REVISIONS TO THE ANNUAL EMPLOYMENT REPORTS AND RELATED POLICIES.	30
1.	The Committee Should revise the number of job caterogies on Form 395. Job Titles should closely reflect job responsibilities	30
C.	<u>BILINGUAL</u> INVESTIGATIONS	33

1.	Far more <u>Bilingual</u> investigations should be performed on the Commission's own motion. . . .	37
2.	All those receiving sanctions in a previous license or review term should receive a <u>Bilingual</u> letter upon their next renewal to insure against recidivism.	38
3.	The scope of a <u>Bilingual</u> investigation should be the <u>entire</u> license period	40
4.	<u>Bilingual</u> investigations are seldom performed in a manner faithful to <u>Beaumont</u> . When significant numbers of minorities are terminated or are not hired, the Commission must contact those persons and learn their side of the story. Named Title VII complainants should also be contacted. A second <u>Bilingual</u> letter should focus, in appropriate cases, on the time sequence between the departure of a minority and the hiring of her replacement	40
5.	The Cable SIS monitoring procedure should be extended to broadcasting	45
6.	The Commission should perform both targeted and random field audits, using a procedure similar to that employed by the IRS for tax audits	45
7.	Site audits should include a review of all personnel files	46
8.	In appropriate cases, predesignation discovery should be had	46
9.	The Midterm License review for broadcasters is presently almost meaningless. To correct this, the outcome of an extremely poor review should be the calling in of an early renewal application	49
O.	THE DECISION TO HOLD A HEARING OR IMPOSE SANCTIONS, INCLUDING FORFEITURES	51
1.	The Commission should state that it will not reject, out of hand, any type of evidence of possible EEO noncompliance -- including inferential evidence, statistical evidence, and evidence of noncompliance at co-owned stations	55

2.	Forfeitures should be assessed at mid-term as well as at the close of a renewal term	60
IV.	FINDINGS AND RECOMMENDATIONS -CABLE TV	60
A.	THE COMMISSION SHOULD INCREASE THE CABLE PROCESSING GUIDELINES FOR THE "ZONE OF REASONABLENESS" TO 100% PARITY	61
B.	DESPITE A POOR INDUSTRY-WIDE TRACK RECORD ONLY TWO CABLE OPERATORS HAVE RECEIVED A FINANCIAL FORFEITURE. THE CABLE ACT PERMITS FORFEITURES TO BE ASSESSED FOR REPEATED EEO VIOLATIONS WITHIN A <u>SINGLE</u> YEAR	61
C.	THE ANNUAL EMPLOYMENT REPORT, FORM 395-A, SHOULD BE REVISED TO MORE ACCURATELY EVALUATE AN OPERATOR'S EEO EFFORTS	64
D.	THE INVESTIGATION OF CABLE OPERATORS EVERY FIVE YEARS SHOULD INVOLVE A MORE THOROUGH EXAMINATION OF SUPPORTING DOCUMENTATION	66
E.	TWELVE CABLE TV AUDITS PER YEAR IS INSUFFICIENT TO VERIFY COMPLIANCE WITH EEO RULES	68
F.	THE PUBLIC HAS A RIGHT TO KNOW IF THE CABLE OPERATOR IN THEIR COMMUNITY PRACTICES EMPLOYMENT DISCRIMINATION. THE COMMISSION SHOULD PUBLISH THE LIST OF CABLE OPERATORS DENIED EEO CERTIFICATION	69
G.	RECORDS SHOULD BE RETAINED FOR A PERIOD OF EIGHT YEARS	70
H.	PROGRAM PROVIDERS USING THE FACILITIES OF MULTICHANNEL VIDEO PROGRAM DISTRIBUTORS SHOULD BE PLACED ON NOTICE OF THEIR EEO OBLIGATIONS	70
I.	TO THE EXTENT THAT VIDEO DIALTONE IS USED TO TRANSMIT THE PROPRIETARY PROGRAMMING OF LECs, THE EEO PROVISIONS OF THE CABLE ACT SHOULD APPLY	72
V.	THE EEO PROVISIONS OF THE COMMUNICATIONS ACT SHOULD APPLY TO TITLE II CARRIERS	74
VI.	A REGULATORY MANDATE FOR THE NEXT GENERATION OF MEDIA AND TELECOMMUNICATIONS	76
A.	EEO SHOULD BE APPLICABLE ACROSS THE BOARD TO EVERY INDUSTRY REGULATED BY THE COMMISSION	76
1.	Diversity and convergence justify universal	

EEO applicability	77
2. Past discrimination in the growth and regulation of all Commission regulated services justifies remedial action even under strict scrutiny	81
a. <u>Fullilove v. Klutznick</u> controls and allows the FCC to regulate to the extent necessary to remedy past (and present) discrimination	81
b. The Commission should hire a historian to document the extent of past discrimination in or associated with its regulation of all businesses it regulates	83
B. REMEDIES SHOULD BE DESIGNED TO HAVE MAXIMUM IMPACT, COST-EFFECTIVENESS AND ADAPTABILITY	84
1. <u>Far</u> more broadcast renewals should be designated for hearing	84
2. The Chief of the Cable Services Bureau should be empowered to tie cable rates to EEO compliance	86
3. The Chief of the Common Carrier Bureau should be empowered to freeze the processing of tariffs until serious EEO grievances are adjudicated, and to tie telephone rates to EEO compliance	86

SUMMARY

Five national organizations active in civil rights urge the Commission to vastly strengthen broadcast, cable and common carrier EEO enforcement.

Although the EEO Rule is far stronger than Title VII, current FCC EEO enforcement procedures lag far behind even the EEOC's often passive approach. The Commission should bring its reporting and data collection forms into conformance with the EEO Rule, which covers more than recruitment and hiring. It should upgrade its investigative procedures so that they conform with the directives of the courts, and take strong, swift and decisive action when the evidence suggests that a regulatee has discriminated.

EEO enforcement for common carriers and new technologies is justified because these industries are converging with broadcasting and cable. Furthermore, the FCC's long and tortured history of involvement in and acceptance of past discrimination requires carefully tailored remedies even under strict scrutiny.

History has proven the Commission's "efforts-based" EEO enforcement policy to be a failure. Commenters have provided a statistical analysis of EEO efforts which show that, since 1981, the number of minorities in the top four categories of the broadcast industry have increased a mere 3.2 percentage points. In the cable TV industry, where the total workforce has tripled in size, minorities in the top four categories have increased from 11.4% to 20%. Neither women or minorities are represented at 100% parity in the broadcast or cable TV industries.

The failure of the Commission's enforcement policy can be linked to a general unwillingness to impose financial forfeitures. Commenters know of only 46 stations that have ever received financial penalties as a result of an EEO violation. This number represents a minuscule sum compared to the total number of broadcasters. On the other hand, stations that have received sanctions have rapidly improved their EEO employment profile.

Historically, only two cable TV operators have ever received financial sanctions. Despite the fact that half the number of audited operators fail on site EEO inspections, only 12 audits (representing .005 percent of the total industry) are conducted each year.

Commenters contend that in order to improve employment practices the Commission must impose financial sanctions more regularly in both the cable TV and broadcast industries. Audits and regional training sessions must be conducted on a much more wide-spread basis.

Most importantly, the Commission must narrow the zone of reasonableness to 100 percent. Over fourteen years have elapsed since the Commission revised its parity guidelines, despite its previous assurances that the zone would shrink.

With respect to common carriers, it is essential that the Commission revise its present Title II EEO jurisdiction, such that the converging technologies will be subject to the same rules as their competitors. Common carriers will have an

increasing impact on diversity of access and should have their employment practices closely monitored.

The mass media and telecommunications are essential to the nation's welfare, democratic ideals, commerce and defense. These industries cannot operate efficiently when minorities and women are vastly underutilized.

Discrimination is an immoral and unseemly throwback to ancient history. With an aggressive regulatory program, the FCC can put an end to mass media and telecommunications discrimination in five years if it chooses to do so.

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TO THE COMMISSION

I. INTRODUCTION

The League of United Latin American Citizens, the Minority Media and Telecommunications Council, the National Association for the Advancement of Colored People, the National Bar Association, and Office of Communication of the United Church of Christ ("OC/UCC"), (collectively "Commenters"), respectfully submit Comments in response to the Commission's Notice of Inquiry, (FCC 94-103, released April 21, 1994, ("NOI")) regarding the implementation of the Commission's equal employment opportunity rules.

The organizations submitting these Comments are well known to the Commission. They are responsible for the vast majority of litigation at the FCC over the past three decades. They collectively represent tens of millions of Americans - consumers of the media and telecommunications - who will be directly affected by the Commission's actions in response to the NOI.

II. THE STATUS OF MINORITY EMPLOYMENT IN THE MEDIA AND TELECOMMUNICATIONS INDUSTRIES.

The final measure of effectiveness of the Commission's

enforcement policies is numerical results.¹ In the broadcast industry there has been *de minimis* change in the representation of minorities at all levels of employment. There was also minimal change in the representation of women. In contrast, the EEO track record of stations that received financial forfeitures substantially improved.

Compared to the broadcast industry, the number of minority and female employees in the cable TV industry increased significantly. However, if one considers that over the past decade the broadcast workforce decreased by 6,000 and cable TV workforce increased by nearly 75,000, there is basis for arguing that the EEO track record of broadcasters exceeds that of cable operators (Exhibits I, II, III, IV).

Among the Regional Bell Operating Companies, where enforcement has been nonexistent, minorities and women are represented at 100 % parity with their presence in the overall U.S. population. This development has taken place despite considerable workforce downsizing.

Given developments in the Cable TV industry, one must conclude that changes in workforce size has a considerable impact on EEO employment practices. However, an analysis of the impact of financial forfeitures and audits clearly shows that rigorous enforcement results in substantial numerical improvements in recruitment and promotion (section ID, *infra*).

¹ OC/UCC has compiled a database from FCC Employment Trend Reports for 1981 through 1992. Exhibits I through VIII were generated from this database.

A. EMPLOYMENT TRENDS - BROADCAST

The overall size of the broadcast industry workforce has declined since the beginning of the last decade. In 1981, there were 154.8 thousand employees. By 1992, there were approximately 6 thousand fewer employees following a 23 thousand workforce expansion that peaked in 1986.

The total number of minorities increased by 1 percentage point from 1981 until 1986 and increased an additional 2.2 percentage points from 1986 until 1992 (Exhibits I and II). There was a comparable increase in the number of minorities in the top four job categories minorities. In 1981, minorities comprised 12.7 % of the top four positions. This increased by 1 percentage point by 1986 when the size of the overall workforce had expanded by 23 thousand employees. By 1992, the percentage of top four minorities continued to increase by an additional 2.4 percentage points.

The representation of women has increased slightly greater than that of minorities. Women held 34.2 percentage of all positions at the beginning of the decade and 39.5 % by 1992. For the top four positions there was a percentage increase of 7.7 points from 24.9 % in 1981 to 32.6 % in 1992.

B. EMPLOYMENT TRENDS - CABLE TV

The workforce size of the cable TV industry more than tripled from 1981 until 1992. In 1981 there were 34.6 thousand employees. This figure steadily increased to 108 thousand by 1992.

Minority representation in the top four positions nearly doubled from 11.4 % in 1981 to 20 % in 1992 (Exhibits III and IV). The total number of minorities increased 11 percentage points during the same period of time.

In the top four positions, the percentage of women also doubled from 15.3 % to 30.7 %. The total number of women increased from 33.4 % to 41.7 %

C. EMPLOYMENT TRENDS - COMMON CARRIERS

Industry-wide data on all Title II carriers is not available.² However, an analysis of the employment reports of the seven Regional Bell Operating Companies ("RBOCs")³ shows that the number of female and minority employees in the top four job categories have slightly increased despite considerable downsizing in the overall industry.⁴

In 1993, the percentage of minorities in the top four positions was 22.2% compared to 15.5% in 1987. Women represented 47.5% of the top four in 1993 compared to 40.1 in 1987 (Exhibit V).

In 1993, the percentage of African-Americans, Asian Pacific Islanders, Hispanics, and American Indians and Aleuts in the top

² For nearly 25 years the Commission has collected and stored common carrier Annual Employment Reports. An industry-wide employment trend analysis has never been compiled by the Commission.

³ OC/UCC has developed a database from the Annual Employment Reports, Form 395, filed by each of the RBOCs from 1987 through 1993.

⁴ The total number of employees laid off by the RBOCs between 1988 and 1992 was nearly 60,000 people (Exhibits XII, XIII).

four positions was 13%, 2.4%, 6.3%, and .4 % respectively (Exhibit VI). These percentages are roughly equal to 100 percent parity with the population of each of these ethnic groups in the U.S.

For every African-American male there are two and one-half African-American females in the top four positions (i.e. 71% versus 29%, Exhibit VII). This employment pattern is disproportionate with the representation of African-American males and females in the overall U.S. population.

The under-representation of African-American males in upper management holds true for each of the seven Regional Holding companies. Exhibits VIII through XI demonstrate that this pattern does not apply to males and females from other ethnic groups. At Ameritech, for example, African-American females represent 25.7% of female managers and officials while males account for 9.2% of male managers and officials. Hispanic females and males, on the other hand, are for 2.1% and 2% respectively.

Further information is required in order to accurately monitor the representation of women and minorities in top management. Interviews with industry executives indicate that the telephone industry traditionally has seven layers of management.⁵ Employment figures for these seven layers are consolidated into the manager and official job category for FCC reporting purposes. Consequently, it is impossible to accurately

⁵ Interview with RBOC executives March 26, 1994.

ascertain the number of minorities and women in top management.

According to anecdotal information⁶ minorities, particularly African-Americans, have been disproportionately eliminated from top management positions during the course of downsizing. Only by adopting additional job categories can employment practices in top management be accurately monitored (see section , infra).

D. FINANCIAL FORFEITURES RESULT IN SUBSTANTIAL IMPROVEMENTS IN EMPLOYMENT PRACTICES

While the Commission has recently revised its EEO financial forfeitures in order to make them commensurate with penalties for non-EEO infractions, data indicate that an increase in such sanctions is warranted.

In order to assess the impact of past financial forfeitures, OC/UCC compared the employment profiles of a sampling of penalized broadcasters with employment trends of the overall broadcast industry.⁷ One year before the penalty assessment the percentage of total minorities at the penalized stations was 3.9 percent. One year after the assessment, total minorities had increased to 14.6 percent. In the top four categories, the percentage of minorities changed from 1.8 to 10.7.

These increases far exceeded changes in the level of

⁶ id.

⁷. As of December 1993, there were 46 stations that had received financial forfeitures. OC/UCC examined the Annual Employment Reports of 40 of these stations for the year prior to receiving the sanction as well as the year following the sanction. For the purpose of this study, changes in the numbers of women and minorities for the sanctioned stations were compared to changes in the number of women and minorities industry-wide.

minority employment for the entire industry. For the purpose of comparison changes in minority and female employment were examined for the years 1988 and 1990 for industry as a whole. As indicated by Exhibits XIV and XV, improvements in the numbers of minorities represented 10.7 and 8.9 percentage point increases for total and top four job category minorities, respectively. In comparison, the number of minorities in the entire industry increased .7 percentage points for total minorities and 1 percentage point for minorities in upper positions from 1988 until 1990.

Evidence that financial forfeitures have a favorable impact on employment patterns underscores the need for the imposition of such sanction in appropriate cases on a more regular basis.

III. ANALYSIS AND RECOMMENDATIONS - BROADCAST

The thrust of the Commission's enforcement strategy has been to focus upon the good faith efforts of broadcasters and has de-emphasized the use of numerical standards.⁸ Adopted during an era when many were opposed to hiring quotas,⁹ the Commission devised an enforcement program based upon procedural requirements that were expected to yield numerical results.

⁸ In 1987, the Commission reiterated, "its principal concern in monitoring the EEO activities of broadcasters is with the good faith efforts of licensees to hire and promote in a nondiscriminatory manner." Report and Order 2 FCC Rcd 3967, 3973 (1987) ("1987 Report and Order").

⁹ See Comments of the U.S. Department of Justice and the Anti-Defamation League of B'nai B'rith in The Matter of Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity, MM Docket 85-350.

In retrospect the Commission's "efforts-based" policy has proven to be a failure. Seven years after adoption of the policy in 1987, the total number of minority employees in the broadcast industry has increased by a mere 1.4 percentage points. The number of minority officials and managers has increased 1.6 percentage points.¹⁰ Measured over an even longer period of time, the number of minorities and women employed in the broadcasting industry is equally disappointing. From 1981 until 1992 the percentage of total minorities increased by 3.1 percentage points. Minorities in the top four positions increased by 3.7 percentage points during the same period.

In order to achieve results, the Commission must vastly improve its efforts-centered enforcement program and set higher employment level standards. The following recommendations are intended to strengthen the Commission's "efforts-based" policy - the foundation of its enforcement strategy - and simultaneously introduce overdue numerical standards.

A. BROADCAST EEO RULES AND POLICIES

- 1. THE COMMISSION SHOULD INCREASE ITS PROCESSING GUIDELINES FOR THE "ZONE OF REASONABLENESS" TO 100% PARITY**
 - a. The Number of Minority and Women in Broadcasting Must be Increased in Order to Achieve the Goals of Diversity and Increased Employment Opportunities**

¹⁰ The total number of women increased by 1.2 percentage points from 1988 until 1992. During the same period the number of female managers and official increased 2.6 percentage points. NOI para. 15.

The Commission has taken a positive step to further EEO goals with this NOI, but it must go further to re-examine some of the practices affecting EEO efforts not mentioned in the Notice. One of these practices is the Commission's lack of emphasis on the statistical levels of minority and female employment within the broadcast industry. Due to pressure from those who feel that a concern for employment numbers amounts to quotas, the Commission has downplayed the significance of the relationship between reasonable minority and female employment and diversity. But the judicial and legislative history demonstrating the nexus between higher numbers of minorities and women in broadcasting and the goals of EEO policy remains. Commenters therefore urge the Commission to revise its processing guidelines to encourage broadcasters to employ minorities and women at a ratio directly proportional to their numbers in the available labor force.

b. The Current "50/50" Guideline was not Intended to be a Stopping Point for Broadcast EEO Efforts.

In 1972, the court held that broadcast licensees should employ minorities and women at a percentage within a "zone of reasonableness" compared to the number of minorities and women in the available labor force. Stone v. FCC, 466 F.2d 316, rehearing denied 466 F.2d 331 (D.C. Cir. 1972). See Also, Bilingual Bicultural Coalition on Mass Media v. FCC, 492 F.2d 656 (D.C. Cir. 1974). Not long after, the Commission quantified this zone by establishing EEO processing guidelines that set a percentage of parity between licensees' employment levels and labor force statistics. The Commission revised its processing guidelines to

their current level of 50% parity in 1980."¹¹

Prior to 1980, the Commission consistently reassured the public that the zone of reasonableness was, "a dynamic concept, which contracts as licensees are given time to implement our antidiscrimination rules and policy." See, e.g., In re Application of Mission Central Company, 54 FCC 2d (1975); In the Matter of Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees, 60 FCC 2d 226, 229 (1976); In re Application of Tulsa 23, 4 FCC Rcd 2067, 2069 (1989). In fact, the court directed the Commission to adopt increasing levels of parity, stating "the Commission can be expected" to adopt a more stringent view of the acceptable zone over time, and move toward the ultimate goal of complete parity. National Organization of Women v. FCC, 555 F.2d 1002, 1018 (D.C. Cir. 1977); Los Angeles Women's Coalition for Better Broadcasting v. FCC, 584 F.2d 1089 (D.C. Cir. 1978).

Yet the Commission's processing guidelines quantifying the zone at 50% parity have remained static for the past fourteen years. During that time, according to the courts and the Commission's own analysis, it has become increasingly less

¹¹ The Commission currently selects for further evaluation broadcast licensees with five to ten employees where minorities and women are employed on a full-time basis at a ratio of less than 50% of their availability in the labor force overall and a ratio of less than 25% of their availability with respect to the upper four job categories. Licensees with eleven or more full-time employees are subject to further review if minorities and women are employed full-time and in the upper four job categories at a ratio of less than 50% of their availability in the labor force. See, FCC Public Notice #1364, December 15, 1983.

reasonable for broadcasters to employ minorities and women at that level. Broadcasters have been given an inordinate amount of time to implement EEO policy. Each licensee has been exposed to the guideline for at least one renewal cycle. The Commission has also had time to assess the policy's achievements. The Commission has simply retreated from its earlier commitment to provide more employment opportunities to minorities and women due to pressure from those that feel that parity guidelines amount to hiring quotas.

Given the less than satisfactory increase of minority employment demonstrated by Commenters infra, the Commission ought to make good on its original promise to re-visit its parity guidelines and dispense with half-measures of EEO compliance. Commenters recommend that the Commission to adopt a 100% parity rule.

2. THE COMMISSION SHOULD EXTEND ITS EEO JURISDICTION TO THE NETWORKS.

In order for the Commission to act in the public interest and execute its EEO duties responsibly, it must regulate the employment practices of the networks. Networks are responsible for the majority of programming, supplying approximately ninety hours per week to their affiliates. Networks also control the content of programming by financing development and production and purchasing programming from outside suppliers. Network employees see programming through from its inception to air time, and the viewing audience is affected tremendously by their decisions.

Minority and women viewers are especially affected. The extent to which broadcast licensees serve the portion on the public is directly related to the employment practices of the entities charged with making programming decisions. Clearly, the ability of broadcast licensees to provide diverse programming which serves all Americans depends on the networks. The Commission therefore has "reasonably ancillary jurisdiction" to regulate their employment practices to achieve its important regulatory goals. See, e.g., Southwestern Cable Co. United States, 378 F.2d 118 (1967); Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470 (2d Cir. 1971); U.S. v. Midwest Video Co., 406 U.S. 649 (1979).

3. THE COMMISSION SHOULD CLARIFY ITS POSITION ON DEFENSES TO BROADCAST EEO COMPLAINTS.

- a. Race-neutral factors (market size, station size, format and pay) should be identified and excluded as defenses for noncompliance. It is no harder -- indeed it is often easier -- to "find qualified minorities" in small as in large markets.

The Commission has much too readily refused to find discriminatory intent even where it's obvious. For example, licensees regularly defend their EEO nonperformance with racist theories of minorities' unwillingness to commute short distances, minorities' unwillingness to work for low pay, minority organizations' unwillingness to refer applicants, or minorities' hesitation about working for "country/western" formatted stations. Sexist theories abound in the industry too, although the Commission seldom does anything about it. See, eg, KEZE Radio, 44 RR2d 1527 (1978), ("[y]our explanation for the

station's difficulty in retaining female employees is not entirely satisfactory. Men do not experience pregnancy; however, they also marry, divorce and have 'other personal problems.'") Yet the Commission did not even see fit to issue a short term renewal in that case.

Racist stereotypes embedded in EEO defenses are uniformly rejected by the Commission, as they should be. See, eg., WXBM-FM, Inc., 6 FCC Rcd 4782, 4784 ¶15 (1991) (rejecting licensee's claim that Blacks won't drive 13 miles to work). However, in only one case, The Lutheran Church/Missouri Synod, 9 FCC Rcd 914 (1994), has the Commission called these stereotypes what they really are -- proof of discriminatory intent showing that the licensee or franchisee lacks the requisite character to hold a Commission authorization.

The Commission should take this opportunity to announce that the "learning phase" of EEO regulation has ended, and the strict compliance phase has begun. EEO violations seldom, if ever, occur unintentionally. Thirty years after the enactment of Title VII, no broadcaster needs to be reminded to undergo "self assessment" when she goes to work every day and obviously observes that there are few if any minorities employed at her station.

For over 20 years, broadcasters have been on notice of the EEO rules. Broadcasters have filed annual employment reports since 1971. They cannot claim to be ignorant about the racial compositions of their own staffs. No broadcaster can be unaware

of the Commission's heightened level of review of its licensees' EEO performance under Bilingual II in the past six years. See Broadcast EEO, supra.

The time has therefore come for the Commission to announce that it will no longer entertain defenses of ignorance of the law and ignorance of how one's self-evident conduct might be violating the law. It is time to recognize that EEO violations are almost always intentional violations implicating the licensee's character. Black Broadcasting Coalition of Richmond v. FCC, 556 F.2d 59 (D.C. Cir. 1977) ("Black Broadcasting Coalition").

Character is implicated because an EEO violation can seldom, if ever occur without the participation and consent of a station's or cable system's owner or its general manager. Thus, a licensee's or franchisee's deliberate representation of itself to the Commission, the public, and job-seekers as an equal opportunity and affirmative action employer when it is not such an employer is simply not candid. It is a "misrepresentation" going directly to the licensee's or franchisee's character. FCC v. WOKO, 329 U.S. 223, 227 (1946); RKO General, Inc. v. FCC, 670 F.2d 231, 233 (1981); Pass Word, Inc., 76 FCC2d 465 (1980); WMOZ, Inc., 36 FCC 202, 237-239 (1964).

In this light, the "small market" defense should be seen for what it is: a transparent smokescreen aimed at protecting discriminators. Virtually every professor at a Black college's communications program repeatedly advises her students to start

their careers in small markets. Small markets, especially in the south, are home to an abundance of minorities with broadcast talent. There is nothing intrinsic in a "small market" which makes it harder to recruit "qualified minorities" than "qualified nonminorities" -- a term which looks silly on paper because it is quietly assumed that nonminorities are qualified at birth.

- b. The way a licensee may "decrease ...burdens" of EEO compliance is to stop discriminating. The burdens are extremely slight, and barely result in the provision of sufficient information to allow the Commission and the public to monitor compliance.**

The NOI, ¶26, asks how "administrative burdens" can be decreased. The answer is that these "burdens" are so slight as to be virtually meaningless. After deregulation, EEO is virtually all a licensee has to do to retain a valuable franchise. Thus, the Commission should have zero tolerance for noncompliance, and should make it clear that the way individual licensees may "decrease... burdens" is to just stop discriminating now.

However, there is one burden which falls equally on licensees and petitioners to deny, which is equally unfair to both, and which can be alleviated. That burden is the Commission's grave underfunding and understaffing of the EEO Branch. The time it takes to review a renewal petition is still three years -- the same time it took in the mid-1970s.⁵

⁵ By 1976, when the time required for review of petitions to deny began to exceed three years, Chairman Wiley inaugurated "Petition to Deny Day" on the Commission's calendar, hoping to expedite matters. Dick Shiben, then Chief of the Renewal and Transfer Division of the Broadcast Bureau, inadvertently and